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No. 00-742

Supreme Court, U.S.
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In The
Supreme Court of the United States

**D'ELEGANCE MANAGEMENT LIMITED, INCORPORATED,**

*Petitioner,*

v.

**UNITED STATES OF AMERICA, for the use and benefit of S & D Land Clearing; MIKE MITCHELL, d/b/a Malaco,**

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# RESPONDENTS' BRIEF IN OPPOSITION

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**A. Graham Shirley**
***Counsel of Record***
**1305 Navaho Drive, Suite 400**
**Post Office Box 17529**
**Raleigh, North Carolina 27619-7529**
**Telephone: (919) 981-0191**

***Counsel for Respondents***

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

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## QUESTION PRESENTED

Whether the laws of the State of North Carolina allow a plaintiff to recover, as damages for fraud, expenses legitimately attributable to a defendant's fraudulent conduct.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit are D'Elegance Management, Inc. as Defendant-Appellant and Cross-Appellee and the United States For America for the Use and Benefit of S&D Land Clearing, Inc. and Mike Mitchell d/b/a Malaco as Plaintiffs-Appellees-Cross-Appellants.

## CORPORATION DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Respondents declare that they have no parent companies or any wholly owned subsidiaries.

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents, United States of America, for the use and benefit of S&D Land Clearing, Inc. and Mike Mitchell, d/b/a Malaco, respectfully request that the Court deny the Petition for a Writ of Certiorari (hereinafter "Petition") seeking review of the decision of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals of July 13, 2000 (Pet. App. at 1) is unpublished and may be found at 217 F.3d 843 (Table), 2000 WL. 966034 (4th Cir. July 13, 2000), and the District Court opinion (Pet. App. at 25) is unreported.

## STATEMENT OF THE CASE

This action arises out of the removal of debris in Eastern North Carolina following Hurricane Fran. (Pet. App. at 5.) Environmental Corrections Corp. a/k/a Waste Control Services ("Waste Control") was the prime contractor with the U.S. Army Corps of Engineers for the removal of construction and demolition debris ("C&D debris") in eight (8) counties in North Carolina including New Hanover County. (Id.) Waste Control subcontracted with D'Elegance Management Ltd., Inc. ("D'Elegance") for the removal of C&D debris from New Hanover County. (Id.) Mike Mitcheli d/b/a Malaco ("Mitchell") then entered into negotiations with D'Elegance regarding a possible subcontract. During those negotiations, D'Elegance represented to Mitchell that it had contracted with Waste Control to remove not only all of the C&D debris in New Hanover County, but also all the of the vegetative debris. (Id.) Based upon these representations, Mitchell subcontracted with D'Elegance to perform debris removal in New Hanover

County. (Id.) Removal of vegetative debris is more profitable than the removal of C&D debris. (Id.) Mitchell testified at trial that he would not have entered into the subcontract had he known that he would not be allowed to remove vegetative debris. (Pet. App. at 5-6).

Mitchell began removing debris pursuant to the subcontract on October 4, 1996. (Pet. App. at 6.) Approximately 5 days into the subcontract, D'Elegance allowed Mitchell to move his crews out of Wrightsville Beach and to begin work in the rest of New Hanover County. (Id.) On that day, Mitchell was informed that vegetative debris was outside the scope of the contract. (Id.) Despite learning that vegetative debris was not part of the contract, Mitchell continued to remove C&D debris pursuant to the subcontract because he was concerned that if he abandoned the contract he would be subject to liability for breach of contract and would harm his subcontractors financially. (Id.)

Mitchell assigned a portion of his claim against D'Elegance to one of his sub-contractors, S&D Land Clearing, Inc. (Pet. App. at 7.) This action was initiated by the United States of America for the Use and Benefit of S&D Land Clearing, Inc. against D'Elegance in the United States District Court for the Eastern District of North Carolina (the "District Court"), seeking to recover claims against D'Elegance and against Waste Control and Waste Control's surety pursuant to the Miller Act. See 40 U.S.C.A. §§ 270a-270d (West 1986, Supp. 2000). (Pet. App. at 8 n.6.) On December 31, 1997, Mitchell filed an Amended Complaint asserting five claims against defendant D'Elegance seeking to recover for breach of contract, fraud, quantum meruit, negligent misrepresentation, and unfair and deceptive trade practices. (Pet. App. at 25.)

At trial, Mitchell presented evidence regarding the profit he contends he would have earned had he been allowed to remove vegetative debris in New Hanover County. (Pet. App. at 27-28.) Mitchell also offered evidence of costs of more than $100,000 that he would not have incurred but for

D'Elegance's inducing him to enter into the contract. (Pet. App. at 22.) Mitchell subsequently argued to the jury during closing arguments, without objection from D'Elegance, that he was entitled to fraud damages for the costs he had incurred as a result of being induced to enter into the contract. (Id.)

Following trial, the jury awarded Mitchell $400,000 in compensatory damages for breach of contract and $100,000 for fraud as compensatory damages plus $500,000 in punitive damages. (Pet. App. 9-10.)[1] On November 3, 1998, pursuant to D'Elegance's renewed Motion for Judgment as a Matter of Law or in the alternative, pursuant to Rule 59 of the Federal Rules of Civil Procedure, D'Elegance's Motion for a New Trial or to Alter or Amend the Judgment, the District Court partially granted D'Elegance's motion and set aside Mitchell's $100,000 fraud damages award. (Pet. App. at 29.) The District Court granted D'Elegance's Motion as to the fraud damages because it held Mitchell failed to present sufficient evidence of lost profits related to vegetative debris. (Id.) On November 2, 1998, the District Court entered a Judgment against D'Elegance (Pet. App. at 48.) On December 2, 1998, D'Elegance filed its Notice of Appeal. Mitchell noticed his cross-appeal on December 15, 1998.

In a July 13, 2000 decision, the Fourth Circuit Court of Appeals affirmed the denial of D'Elegance's Motion for Judgment as a Matter of Law on Mitchell's claim for breach of contract, the denial of Mitchell's request to treble the breach of contract damage award, and affirmed the District Court's award of attorney's fees to Mitchell, and the registration of the Judgment. (App. at 24.) The Court of Appeals reversed the decision of the District Court to set aside the compensatory damage award of $100,000 for fraud. (Pet. App. at 24.) In

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[1] Following the jury's verdict, Mitchell elected to forego its punitive damages award and instead elected to have its compensatory damages trebled pursuant to N.C. Gen. Stat. § 75-16. (Pet. App. at 10.)

reaching its decision, the Court found that Mitchell offered evidence of costs of more than $100,000 that he would not have incurred but for D'Elegance's inducing him to enter into the contract. (Pet. App. at 21-22.) The Court of Appeals also noted that Mitchell argued to the jury, without objection from D'Elegance, that he was entitled to fraud damages for the costs incurred as a result of entering into the contract. (Pet. App. at 22.) The Court of Appeals found that substantial evidence supported the conclusion that Mitchell was entitled to compensatory damages in the amount of the costs Mitchell incurred as a result of entering into the contract with D'Elegance. (Id.) Finally, the Court of Appeals ruled that the compensatory damages for fraud should be trebled pursuant to N.C.G.S. §75-16. (Id.)

## REASONS FOR DENYING THE WRIT

The Court should deny the Petition for a Writ of Certiorari for the following reasons. First, the Petition fails to present a significant federal question. Second, the decision of the Court of Appeals is not in conflict with the decisions of the North Carolina Supreme Court.

### A. THE PETITION FAILS TO PRESENT A SIGNIFICANT FEDERAL QUESTION.

This is a case involving breach of contract and fraud in the inducement of a contract which is in the federal court system by virtue of S&D Land Clearing, Inc. asserting a cause of action against Waste Control and Waste Control's surety pursuant to the Miller Act. See 40 USCA §§ 270(a)-270(d) (West 1986 Ed. Supp. 2000.) (Pet. App. at 8 n. 5.) The issue before the Court is purely an issue of State law.

Petitioner's request for relief meets none of the tests set forth in Rule 10 of the Rules of the Supreme Court of the United States. Petitioners concede that it is the general practice of the Court to deny certiorari to review decisions of the Courts of Appeals as to issues of state law. See Petition at 7. The petition is based upon a belief that the decision of the Fourth Circuit Court of Appeals runs contrary to established state law and therefore warrants review by the United States Supreme Court. (Pet. App. at 7.) For the reasons discussed below, the decision of the Court of Appeals is not inconsistent with the decisions of the Supreme Court of North Carolina.

Petitioners also argue that because the Project at issue was governed by federal law and the plaintiff brought suit in the name of the United States, a federal interest is impacted by the decision of the Court of Appeals. See Petition at 8. Petitioner further argues that future parties participating in federal projects will be guided by this case in that the Court of Appeals patent misapplication of state law should not be allowed to stand and create uncertainty to the contractual rights of future parties to federal projects. No where does Petitioner indicate how the Court of Appeals decision will create uncertainty as to contractual rights of future parties to the Federal projects. The issue before the Court of Appeals was whether respondent presented sufficient evidence of damages arising from petitioner's fraud. This is purely a state issue and no federal question is presented.

## B. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE NORTH CAROLINA SUPREME COURT.

The petition should be denied because established law allows a plaintiff to recover for outlays attributable to fraudulent conduct and because respondents have not been allowed a double redress for a single wrong.

Petitioner argues that by allowing Mitchell to recover as damages for fraud the expenses incurred as a result of entering into its contract with D'Elegance, the Court of Appeals provided Mitchell with double redress for a single wrong. In an action for fraud, the measure of damages is generally the difference between the value of what was bargained for and what was actually received. Norburn v. Mackie, 264 N.C. 479, 141 S.E.2d 877 (1965.) Recovery may also be had for other outlays legitimately attributable to such parties fraudulent conduct. Kell v. Trenchard, 142 F. 16, 20 (4th Cir. 1905.) Accordingly, respondents were allowed to recover the costs incurred as a result of D'Elegance's fraud and Petitioner's argument must fail.

Petitioner's argument that respondents have somehow obtained a double recovery, must also fail. This argument is based upon the doctrine of election of remedies. See Petition at 19. However, the record reveals that Mitchell did not obtain a double recovery for a single wrong. Petitioners concede that for Mitchell's breach of contract damages, Mitchell claimed he is entitled to lost profits he would have earned from the contract had he been permitted to load and haul all C&D debris in New Hanover County. See Petition at 4. In presenting evidence as to lost profits for breach of contract, Mitchell's expert, Frank Coleman, deducted the expenses actually incurred, and projected costs to be incurred, in arriving at Mitchell's projected lost profits. (Pet. App. at 9 n.6, 4-15 n.11.) Accordingly, the lost profits sought by Mitchell did not

include the costs incurred by Mitchell. Mr. Coleman's analysis was consistent with the law of North Carolina where in calculating lost profits, costs are subtracted from proceeds. Catoe v. Helms Const. & Concrete Co., 91 N.C. App. 492, 496, 372 S.E.2d 331, 334 (1981). Because respondent excluded the costs incurred in presenting evidence of lost profits, an award of damages for the costs incurred as a result of D'Elegance's fraud does not constitute a double recovery.

Finally, Respondents argued to the jury during closing arguments – without objection from D'Elegance – that Mitchell was entitled to fraud damages for costs incurred as a result of entering into the contract. Having failed to object at trial, D'Elegance should not be permitted to raise this argument now.

## CONCLUSION

For the reason set forth above, the Petition for a Writ of Certiorari should be denied.

Dated: December 15, 2000.

Respectfully Submitted



Augustus G. Shirley, II
*Counsel of Record*
Lewis & Roberts, PLLC
1305 Navaho Drive, Suite 400
Post Office Box 17529
Raleigh, North Carolina 27619-7529
Attorneys for Respondents
United States of American for the Use and
Benefit of S&D Land Clearing, Inc. and
Mike Mitchell d/b/a Malaco